

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LANCE ALLEN SCHMITT,

Defendant-Appellant.

UNPUBLISHED

July 31, 2007

No. 264176

Oakland Circuit Court

LC No. 04-197437-FC

Before: Zahra, P.J., and Cavanagh and Schuette, J.J.

ZAHRA, P.J., (*dissenting*).

I respectfully dissent. This case is difficult to resolve and tragic in result, not only because it involves the needless homicide of 44 year-old Peter Richard, but also because it is a case in which many, if not most, objective observers would find sympathy for the defendant, who is currently serving a 20 to 40 year term of incarceration. While I recognize the tragic circumstances of this case and the sympathy that is due not only to the family of the victim, but also to the defendant and his family, I cannot disregard the rule of law applicable to this case. I conclude the majority has mischaracterized the dispositive issue in this case. The majority opinion turns on whether defendant waived his right to effective assistance of counsel. The dispositive issue in this case is not whether defendant waived his fundamental right to counsel but rather whether defendant waived a more general right to call a specific witness—Dr. Werner Spitz, who would have offered expert testimony on the issue of causation. Contrary to the conclusions reached in the majority opinion, I conclude defendant made a valid waiver of his right to call Dr. Spitz to testify at trial. I further conclude defendant’s counsel was not ineffective.¹

Basic Facts and Procedure

1. The Assault and Death of Peter Richard

¹ Defendant has set forth a number of other issues that the majority opinion properly does not address, given the result reached by the majority. My dissent is premised solely on my disagreement with the conclusions reached in the majority opinion. I express no opinion regarding the remaining issues raised by defendant on appeal.

Defendant joined Joseph Stapleton to severely beat Peter Richard behind a McDonald's Restaurant on November 20, 2002. Nearly 16 months had passed from the time of the assault until Richard's death. Throughout that time, Richard appeared to be leading a normal life. Richard, however, continued to complain of back pain. Nearly one year after the assault, Richard was diagnosed with a herniated disk. There was substantial evidence presented that would support and refute the conclusion that the herniated disk was the result of the assault by defendant. More than 14 months after the assault, Richard underwent surgery to remove the herniated disk. This surgery was not required and was left to the discretion of Richard, who elected to go forward with the surgery. The surgery appeared to be successful. Five weeks after the surgery, however, Richard died of a pulmonary embolism. The medical examiner discovered a blood clot in Richard's left lung and concluded it was the source of the embolism. The medical examiner determined the manner of Richard's death to be a homicide: the embolism was caused by the surgery to correct the herniated disk that was caused by the assault inflicted on Richard by the defendant.

Defendant pleaded no contest to assault charges stemming from the attack. On March 26, 2003, almost one year prior to the death of Richard, defendant was sentenced to three years' probation with the first eleven months of his probation to be served in the county jail. Defendant had served his jail time and was on the road to rehabilitation when he learned his assault conviction would be set aside and he would be facing murder charges.

2. The Decision to Retain But Not Call Dr. Werner Spitz at Trial

Defendant was appointed counsel who then sought and obtained funds from the Oakland County Circuit Court to retain a medical expert to rebut the prosecution's theory of the cause of death. Defendant's counsel used all of the court provided funds to retain one of the nation's premier medical examiners—Dr. Werner Spitz. Dr. Spitz reviewed the same records reviewed by the Oakland County medical examiner and concluded in a written report that the death of Richard was not the result of the November 20, 2002 attack.

Thereafter, defendant's trial counsel, Michael McCarthy received a bill from Dr. Spitz that indicated that McCarthy should not rely on Dr. Spitz as an expert witness until an additional \$4,000 was paid to Dr. Spitz. When McCarthy called Dr. Spitz's office, he was informed that there had been an error. Thereafter, McCarthy received another bill for \$5,600. This letter indicated that Dr. Spitz's fee for court testimony was \$5,000 per day and that he would require \$5,600 at least ten days before the scheduled date of his testimony.

McCarthy submitted to the trial court a letter of explanation, a proposed order, and Dr. Spitz's bill to the court. The trial court would not provide additional funds without first conducting a hearing. McCarthy informed Dr. Spitz that he could not obtain prepayment without a hearing and Dr. Spitz refused to attend any hearing unless he was paid in advance.

Prior to trial, McCarthy served a subpoena on Dr. Spitz and informed Dr. Spitz that he had submitted his bill to the trial court. McCarthy informed Dr. Spitz that his fee would not be paid in advance. McCarthy claimed that Dr. Spitz had acknowledged that he understood he would not be compensated in advance of trial. Significantly, Dr. Spitz did not refute this fact. Rather, Dr. Spitz stated he could not recall whether he and McCarthy had resolved or discussed prepayment of his fees at that time. McCarthy believed the issue of prepayment was resolved

and that there was no conflict regarding the fee. McCarthy was confident that Dr. Spitz would testify.

In the midst of trial, McCarthy gave Dr. Spitz a specific date on which McCarthy expected Dr. Spitz to appear for trial. At that point in time, McCarthy realized there was a problem with Dr. Spitz's trial preparation. Dr. Spitz would honor the trial subpoena, but he would not prepare himself for his testimony. McCarthy admitted that it would have been helpful to have Dr. Spitz willingly testify. However, under the circumstances, McCarthy elected not to call Dr. Spitz because McCarthy believed Dr. Spitz's testimony would not be helpful without preparation, he did not have confidence in Dr. Spitz, and he did not think it would be responsible to call a witness when he did not know that the witness was going to say. More importantly, McCarthy believed he was winning the case and that he had presented through direct and cross-examination ample evidence to refute the prosecution's theory of the case. Defendant was also confident in his case, as he refused to have the jury instructed on lesser-included offenses to murder in the second degree. Needless to say, the jury returned a verdict of guilty.

Analysis

1. The Waiver of the Right to Call Dr. Spitz

The majority opinion mischaracterizes the dispositive issue in this case as a waiver of the right to the effective assistance of counsel. The right to counsel is a fundamental right. The standards for waiving a fundamental right are much higher than the waiver standards for non-fundamental rights. "While the defendant must personally make an informed waiver for certain fundamental rights such as the right to counsel or the right to plead not guilty, for other rights, waiver may be effected by action of counsel." *People v Carter*, 462 Mich 206, 217; 612 NW2d 144 (2000). To ordinarily waive a right knowingly and intelligently, the defendant must only understand the nature of the right and how it would likely apply "*in general*" to the circumstances—even though "the defendant may not know the *specific detailed* consequences of invoking it." *United States v Ruiz*, 536 U.S. 622, 629; 122 S Ct 2450 (2002).

In this case, defendant generally understood the value of calling a causation expert to testify on his behalf. Defendant further understood the risks associated with calling Dr. Spitz after Dr. Spitz stated he had not and would not prepare to testify at trial. The record in this case establishes that defendant made an informed, knowing, voluntary and intelligent waiver of his right to call Dr. Spitz. After the last witness testified at trial, defendant was put under oath and McCarthy questioned defendant about whether he wanted to call Dr. Spitz to testify. Defendant was informed of the benefits of Dr. Spitz's testimony and the risks and the consequences of calling Dr. Spitz to the witness stand in his case:

[Defense Counsel]. Up until at least two weeks ago we had intended to have Dr. Spitz testify as a witness for your defense, correct?

[Defendant]. Yes.

[Defense Counsel]. Have you been made aware by myself of the developments with Dr. Spitz over his complaint about a fee?

[Defendant]. Fully aware.

[Defense Counsel]. And you've been informed by myself that the most recent conversation I had with [Dr. Spitz] was two days ago at which time he informed me while he would be here he would not prepare the case for trial?

[Defendant]. Yes.

[Defense Counsel]: And then you and I discussed that could be very devastating to have a person come and testify on your behalf whose testimony I wouldn't have any faith in prior to the time they took the witness stand?

[Defendant]. Yes.

[Defense Counsel]. He indicated to me he wasn't going to cooperate with me. He wasn't going to give me the time in which he needed to be adequately prepared and render his opinion under oath before the jury, correct?

[Defendant]. Yes, he said that.

[Defense Counsel]. So then at the conclusion of those discussions you instructed me that it's your choice to not have Dr. Spitz called on your behalf; is that correct?

[Defendant]. That's correct.

Defendant agreed that it would be "very devastating" to have a witness testify when McCarthy did not have "any faith" in the witness. Defendant recognized that Dr. Spitz was not cooperative and would not dedicate any time to prepare and offer an opinion at trial. Defendant acknowledged it was his choice not to have Dr. Spitz testify at trial. At the *Ginther*² hearing, defendant again stated that it was his decision not to have Dr. Spitz testify at trial.

On these facts, I conclude defendant meaningfully participated in the decision not to call Dr. Spitz to testify and therefore waived any objection to the decision not to call Dr. Spitz to testify at trial. Waiver is the "intentional relinquishment or abandonment of a known right" that extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Thus, defendant's waiver forecloses appellate review of any effective assistance of counsel claim arising out of not calling Dr. Spitz.

2. Ineffective Assistance of Counsel

Even if I were to conclude that defendant did not make a proper and valid waiver of his right to call Dr. Spitz, the issue in this case would not be, as stated in the majority opinion,

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

whether defendant waived his right to the effective assistance of counsel. Rather, the critical issue would be whether defendant's counsel was ineffective for failing to call Dr. Spitz or otherwise present a causation expert on behalf of defendant. Defendant specifically claims McCarthy was ineffective because he failed to (a) call Dr. Spitz as an expert witness notwithstanding his indication he would not prepare for trial; (b) meet with Dr. Spitz in person; (c) seek a continuance to secure additional funds or a substitute expert witness when it became evident Dr. Spitz would not prepare to testify at trial; and (d) give Dr. Spitz all of Peter Richard's medical records. I conclude there is no merit to defendant's arguments.³

The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that: 1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective. *LeBlanc*, *supra* at 578.

a. Failing to Call Dr. Spitz

The majority opinion concludes McCarthy was ineffective for failing to call Dr. Spitz to testify. This cannot constitute ineffective assistance of counsel, as the decision not to call Dr. Spitz was a contemplated trial strategy. Failed trial strategy cannot form the basis of a claim of ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Moreover, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A defense is substantial if it might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The majority opinion concludes that Dr. Spitz would have testified that the death of Richard was not proximately caused by the November 2002 attack. The majority opinion reasons that Dr. Spitz's testimony might have shown that the assault did not cause the herniated disk, which in turn led to the surgery that caused the fatal blood clot.

However, McCarthy presented ample evidence refuting the element of causation. McCarthy extracted testimony on cross-examination from Dr. Kurt Coulter that Richard's age, weight and habitual lifting could cause a herniated disk. Donnete Richard testified that Peter

³ Defendant additionally sets forth a hybrid due process/ineffective assistance of counsel claim relating to the jury instructions. Because I conclude the instructions are adequate, I find no merit to this argument.

Richard sustained an injury prior to the assault when trying to lift a patient, resulting in severe back pain. Dr. Fernando Diaz testified that a fall on the back, lifting weights and the lifting Richard did in relation to his employment could all cause a herniated disk. He also stated that just because a transverse process was fractured in the assault does not mean the presence of a herniated disk. McCarthy limited Dr. Diaz's testimony by eliciting acknowledgment that there was no evidence a herniated disk existed until August 2003, ten months after the assault. Dr. Kanu Virani testified that degenerative disk disease at least partially caused the herniated disk. Defendant's own witness, Dr. Richard Moyer, found no clinical findings of a herniated disk other than pain in a straight leg raise. Dr. Moyer testified he never had any suspicion of a herniated disk. Dr. Moyer also said that Richard had been lifting weights, despite being advised against such conduct. In closing arguments, McCarthy highlighted the physical problems Richard had prior to the assault. McCarthy reminded the jury that Dr. Moyer found no evidence of a disk problem following the assault.

In sum, McCarthy presented to the jury the evidence and argument that the assault did not cause the herniated disk. Dr. Spitz's putative testimony would have done no more than challenge the causal connection between the herniated disk and the assault. Therefore, defendant was not deprived of a substantial defense. *Hoyt, supra* at 537-538.

b. Failing to Meet with Dr. Spitz in Person

Plaintiff also claims his counsel was ineffective because he failed to meet in person with Dr. Spitz to discuss the nature of his testimony. Jerome Sabbota, an experienced criminal defense lawyer, testified at a *Ginther* hearing that it is necessary to sit down with a witness to discuss testimony. Sabbota's opinion flies in the face of existing Michigan case law. This Court has held that interviewing witnesses by telephone does not constitute inadequate preparation. *People v Caballero*, 184 Mich App 636, 641-642; 459 NW2d 80 (1990). "Even the failure to interview witnesses does not itself establish inadequate preparation. It must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *Caballero, supra* at 642.

The record reveals McCarthy interviewed by telephone Dr. Spitz and became aware of all the evidence Dr. Spitz would present. Dr. Spitz testified at the *Ginther* hearing that he spoke with McCarthy via telephone regarding his anticipated trial testimony. McCarthy stated that he wanted a professional opinion as to whether Richard's death was caused by the injuries sustained during the assault. Dr. Spitz gave his opinion in a pre-trial report sent to McCarthy. McCarthy had a clear understanding of the substance of Dr. Spitz's testimony from the report. At the *Ginther* hearing, Dr. Spitz testified his trial testimony would have been consistent with his report. Therefore, McCarthy was not ignorant of valuable evidence and his trial preparation with regard to Dr. Spitz did not fall below the objective standard of reasonableness. *Caballero, supra* at 642.

c. The Failure to Seek a Continuance to Secure Additional Funds or a Substitute Expert Witness
When it Was Evident Dr. Spitz Would Not Prepare to Testify at Trial

Defendant also contends he was denied the effective assistance of counsel because McCarthy failed to seek a continuance in order to call a substitute expert witness or to request a hearing in order to obtain funds to pay Dr. Spitz. In reviewing claims of ineffective counsel, the testimony of trial counsel is essential. *Mitchell, supra* at 168-169. The uncontroverted evidence

presented at the *Ginther* hearing established that McCarthy discussed the proposed trial testimony with Dr. Spitz in advance of trial. McCarthy believed he had resolved the fee dispute with Dr. Spitz at that time and that Dr. Spitz would prepare and testify at trial without obtaining additional compensation in advance of trial. In the midst of trial McCarthy learned Dr. Spitz would not prepare to testify without receiving his compensation in advance of his testimony. At that time, McCarthy believed the prosecution's witnesses had done a bad job, that his cross-examination of Dr. Virani and Dr. Diaz had been effective and that the evidence presented by the prosecution had not proven beyond a reasonable doubt that Schmitt was guilty of second-degree murder. Defendant's legal expert, Sabbota, testified that the decision whether to call additional witnesses after the successful cross-examination of opposing witnesses constituted trial strategy. McCarthy had several options to address Dr. Spitz's lack of preparation. These options included (1) seeking additional funds from the court in the midst of trial, (2) seeking a continuance to retain another expert—something that could not be accomplished without obtaining additional funds from the court, and (3) proceeding to verdict because he believed that he was prevailing at trial. The selection of any one of these three viable options is a matter of trial strategy. This Court ought not substitute its judgment for that of counsel regarding matters of trial strategy. *Barnett, supra* at 338. Defendant has simply failed to overcome the presumption of sound trial strategy. *People v. Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Moreover, McCarthy concluded a motion for a continuance would have been futile, since the trial court had two empaneled juries in waiting and the prosecution had presented all its witnesses before McCarthy learned that Spitz would not prepare for trial. Defendant's legal expert, Sabbota, also recognized that the critical question was whether an expert witness was necessary. If an expert witness was not necessary, Sabbota agreed that an adjournment would not be necessary. Again, McCarthy testified that in his opinion he thought he was winning the case. The record reveals that defendant also thought he was winning the case. Defendant was so confident that he would be acquitted that he decided not to request the manslaughter jury instruction.

d. The Failure to Give Dr. Spitz All of the Victim's Medical Records

Defendant also asserts that McCarthy was ineffective in failing to give Dr. Spitz medical records from all of Peter Richard's treating physicians. However, the reason McCarthy wanted Dr. Spitz to testify was to discredit Dr. Kanu Virani, the medical examiner who performed Richard's autopsy. McCarthy gave Dr. Spitz the same records Dr. Virani had when he determined the manner of death. Dr. Virani did not have records from Dr. Fernando Diaz, Dr. Abner Espinosa, or the physical therapist. Thus, defendant has again failed to overcome the presumption that this decision constituted sound trial strategy, *Riley, supra* at 140, and we should not second-guess McCarthy's strategy with the benefit of hindsight, *Dixon, supra* at 398.

Conclusion

Defendant waived his right to call Dr. Spitz to testify on his behalf. Defendants' counsel was not ineffective. The jury heard all the competing evidence and elected to find defendant guilty of murder in the second degree. Defendant's conviction ought not be reversed because defendant elected not to call his retained expert to testify at trial.

/s/ Brian K. Zahra